No .....

In the Supreme Court of the United States.

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL, OWEN READING AND W. J. BAYLEY, *Respondents.*

Petition for Writ of Certiorari, and Brief in Support Thereof.

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INDEX.

Table of Cases.

TABLE OF CASES—Continued.

Statutes.

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J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL, OWEN REDING AND W. J. BAYLEY, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Southland Gasoline Company, respectfully shows:

I.

Summary Statement of the Matter Involved.

(a) This suit is a civil action filed January 2, 1942, (Tr., p. 2) by respondents, as plaintiffs, against petitioner, as defendant, in the District Court of the United States for the Western District of Arkansas.

The complaint filed in the District Court (Tr., pp. 2-20) alleged that the respondents were employees of the petitioner; that petitioner during the period of time between

October 24, 1938, and October 15, 1940, was engaged in the gasoline business and in pursuance of that business purchased gasoline, automobile tires, batteries and automobile accessories in the State of Oklahoma and caused these articles to be loaded upon petitioner's trucks and transported to the State of Arkansas where petitioner sold them, at wholesale, to retail establishments in the State of Arkansas, for resale to the general public; that petitioner each week loaded trucks in the State of Arkansas with automobile tires, accessories and automotive equipment and transported such articles to the State of Oklahoma where they were sold at wholesale to retail establishments in that state for resale to the general public; that petitioner in the conduct of its business operated and maintained trucks and engaged in trucking operations as "a private carrier"; that during all such time each of respondents was employed by petitioner as a truck driver and each respondent, in this capacity, drove petitioner's trucks each week from Arkansas to Oklahoma and from Oklahoma to Arkansas, which trucks were used by petitioner in carrying on its gasoline business. Respondents further alleged failure on the part of the petitioner to pay each of the respondents time and one-half for services performed by them as such truck drivers in excess of the maximum hours provided by the Fair Labor Standards Act.

Certain of the respondents (Henry V. Bloom, C. C. Kendall, and Owen Reding) also alleged a failure to pay the minimum wage provided by Section 6(a) of the Fair Labor Standards Act (Tit. 29, Sec. 206(a), U. S. C. A., 52 Stat. 1062). The claim of these respondents to recover minimum wages pursuant to Section 6(a) of the Fair Labor Standards Act, however, was not in controversy on the appeal to the Circuit Court of Appeals. The order of the District Court (Tr., pp. 26-27) from which the appeal was

prosecuted to the Circuit Court of Appeals for the Eighth Circuit, sustained petitioner's motion to dismiss the complaint of respondents as to their claim for overtime compensation under Section 7(a) of the Fair Labor Standards Act.

(b) The District Court held (Tr., pp. 22-26) that respondents were not entitled to the benefits of Section 7(a) of the Fair Labor Standards Act (Tit. 29, Sec. 207(a), U. S. C. A., 52 Stat. 1063) because they were included within the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1967) exempting any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of the Motor Carrier Act.

(c) The respondents, as appellants, prosecuted an appeal from the decision and judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the judgment and decision of the District Court. The appeal involved a construction of Sections 7(a) and 13(b) of the Fair Labor Standards Act and Section 204 of the Motor Carrier Act (Tit. 49, Sec. 304, U. S. C. A., 49 Stat. 546). The Circuit Court of Appeals held and decided (Tr., pp. 34-39) that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act, 1938, did not apply to employees of private carriers until the Interstate Commerce Commission made a finding (on May 1, 1940) of the necessity for regulation of private carriers with respect to the matters specified in the Motor Carrier Act, 1935.

(d) A certified transcript of the record of said case in the Circuit Court of Appeals for the Eighth Circuit, including the proceedings in that court, accompanies this petition.

II.

Basis Upon Which It Is Contended This Court Has Jurisdiction to Review the Judgment or Decree in Question.

(a) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act of 1938 was not applicable to respondents until the Interstate Commerce Commission made a finding (May 1, 1940) of the necessity for the regulation of private carriers of property by motor vehicle involves an important question of Federal law which has not been, but should be, settled by this court.

(b) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that Section 13(b)(1) of the Fair Labor Standards Act did not exempt respondents from the provisions of said Act prior to May 1st, 1940, is a decision of a Federal question in a way probably in conflict with applicable decisions of this court.

(c) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the exemption provided by Section 13(b)(1) of the Fair Labor Standards Act of 1938 was not applicable to employees of private carriers of property by motor vehicle until May 1, 1940, is in conflict with the weight of authority and is contrary to uniform decisions of the District Courts in many of the circuits and the question has not been heretofore determined by any other Circuit Court of Appeals.

Wherefore, petitioner prays that a writ of *certiorari* issue under the seal of this court to the Circuit Court of Appeals for the Eighth Circuit commanding that court to certify and send to this court, on a day certain, therein to be designated, a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals for the

Eighth Circuit, had in the case numbered and entitled on its docket No. 12,309, *J. W. Bayley, Henry V. Bloom, G. C. Kendall, Owen Reding and W. J. Bayley, appellants,* v. *Southland Gasoline Company, appellee,* to the end that said cause may be reviewed and determined by this court, as provided by law, and that the judgment therein of the Circuit Court of Appeals for the Eighth Circuit be reversed by this court and for such further relief as to this Honorable Court may seem proper.

SOUTHLAND GASOLINE COMPANY,
Petitioner,
By CLAUDE H. ROSENSTEIN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

(Emphases ours.)

The memorandum opinion of the District Court sustaining petitioner's motion to dismiss is found at pages 22-26 of the record; the order of the District Court sustaining the defendant's motion to dismiss is found at pages 26-27 of the record and the opinion and judgment of the Circuit Court of Appeals, not yet published, is found on pages 34-39 of the record.

Grounds for Jurisdiction of This Court.

The jurisdiction of this court is invoked pursuant to Tit. 28, Sec. 347(a), U. S. C. A. (26 Stat. 828, as amended by 36 Stat. 1157 and 43 Stat. 938), and the grounds upon which it is contended this court has jurisdiction to review the judgment and decision of the Circuit Court of Appeals are set forth under "II" of the preceding petition, which are hereby adopted and made a part of this brief.

Statement of the Case.

A statement of the matter involved has already been set forth in the petition, under "I," which is hereby adopted and made a part of this brief.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067), providing that Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 207, 52

Stat. 1063) is not applicable to any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 (Title 49, Section 304(a)(3), U. S. C. A.) did not apply to respondents until May 1st, 1940, on which date the Interstate Commerce Commission found that a need existed for the regulation of private carriers of property by motor vehicle.

2. The Circuit Court of Appeals erred in holding and concluding that respondents by their complaint, stated a claim for the recovery of overtime compensation pursuant to the provisions of the Fair Labor Standards Act of 1938.

ARGUMENT.

PROPOSITION I.

(Specifications of Error 1 and 2.)

The Act is not applicable to respondents because of the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The substantive issue presented to the Circuit Court of Appeals was:

Did the Interstate Commerce Commission have power to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle from the effective date of the Motor Carrier Act of 1935, or did that power not come into existence until May 1, 1940, on which date the Interstate Commerce Commission (*ex parte* No. MC-3, Div. No. 5—Interstate Commerce Commission) determined that a need existed for regulation,

by the Commission, of private motor carriers engaged in interstate or foreign commerce?

The decision of the Circuit Court of Appeals, in our judgment, is bottomed on an erroneous conclusion on this question. Its correct solution determines whether the Circuit Court of Appeals rightly or wrongly decided.

It is the contention of petitioners, which contention, we believe, is supported by the great weight of authority, that the Interstate Commerce Commission *had power*, at all times subsequent to the approval of the Mator Carrier Act of 1935, to prescribe maximum hours of service and qualifications for the employees of private carriers of property by Motor vehicle; that the commission's right *to exercise* this power was based upon its finding of a need therefor, but that the *power* at all times existed. It is the further contention of petitioner that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act of all employees with respect to whom the Interstate Commerce Commission *had power* under the Motor Carrier Act to establish qualifications and maximum hours of service included, at all times, such employees of private carriers of property by motor vehicle despite the fact that the Commission had not found the need *for the exercise* of this power and had not actually exercised the power so conferred upon it by the Motor Carrier Act, as to private carriers.

The Circuit Court of Appeals held the exemption of Section 13(b)(1) was not applicable to respondents solely and only because the Commission, at the time the Fair Labor Standards Act became effective, had not found and did not, until May 1, 1940, find that a need existed for the regulation of private carriers of property by motor vehicles.

The question determined by the Circuit Court of Ap-

peals for the Eighth Circuit in this case has not been decided, so far as we have been able to ascertain by diligent research, by any other Circuit Court of Appeals. The question has been determined by a substantial number of United States District Courts. Except for the decision of the Circuit Court of Appeals for the Eighth Circuit in this case the decisions are unanimous in holding that the exemption provided by Section 13(b)(1) applied at all times since the adoption of the Fair Labor Standards Act despite the fact that it was not until May 1, 1940, that the Interstate Commerce Commission found that a need existed for *the exercise* of the power granted it by Congress to regulate private carriers of property by Motor vehicle.

The following decisions sustain the contention of petitioner:

Faulkner v. *Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590 (D. C. E. D. Arkansas, April 9, 1940);

Bechtel v. *Stillwater Milling Co.*, 33 F. Supp. 1010 (D. C. Western District Oklahoma, June 25, 1940);

Gerdert v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964 (D. C. Southern District, Florida, April 29, 1941);

West v. *Smoky Mountains Stages, Inc.*, 40 F. Supp. 296 (D. C. N. D. Ga., August 5, 1941);

Gavril v. *Kraft Cheese Co., (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener)* 42 F. Supp. 702 (D. C. N. D., Ill., November 27, 1941);

Robbins v. *Zabarsky*, 44 Fed. Supp. 867 (D. C., Mass., May 7, 1942);

Fitzgerald v. *Kroger Grocery & Baking Co.*, 45 F. Supp. 812 (D. C., Kan., June 22, 1942);

Clarence Gibson v. *Wilson & Company*, 4 Labor Cases, ¶60,466 (D. C. W. D., Tennessee, March 20, 1941).

The gist of the above decisions is concisely stated in the fifth paragraph of the syllabus of *Gavril* v. *Kraft Cheese Co., (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener)* 42 F. Supp. 702 (D. C. N. D., Ill.), which reads:

> "Under Fair Labor Standards Act providing that section limiting hours of work and defining rate of overtime compensation shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service under the Motor Carrier Act, driver-salesmen of employer engaged on a national scale in the manufacture and distribution at wholesale of cheese and other food products were excluded from the wage and hour provisions of the Fair Labor Standards Act *regardless of the time at which the Interstate Commerce Commission exercised its power to establish qualifications and maximum hours of service for such employees.*"

The decision of the Circuit Court of Appeals, is based in part on the authority of Interpretative Bulletin No. 9 (United States Department of Labor, Wage and Hour Division—Originally issued March, 1939). This bulletin states that it is the administrator's opinion that until an order is issued by the Interstate Commerce Commission, finding the need for regulation, "employees of private carriers should be considered as not within the exemption provided by Section 13(b)(1)." The following important preface to Interpretative Bulletin No. 9, however, should be considered. It reads:

"The scope of the exemption provided in Section 13(b)(1) involves the interpretation not only of the Fair Labor Standards Act but also of Section 204 of the Motor Carrier Act, 1935. *The act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Section 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by authoritative ruling of the courts.*" (Par. 2, Int. Bull. No. 9)

The above statement is particularly enlightening when it is remembered that the Administrator intervened in the case of *Gavril* v. *Kraft Cheese Co., supra;* that the court "otherwise" determined the interpretation of the exemption granted by Section 13(b)(1) in that case, and that no appeal was taken from that decision, but it was allowed to and has become final.

The Circuit Court of Appeals bases its opinion in part also on certain decisions of this court. The pertinent portion of the opinion of the Circuit Court of Appeals, including the citation of the cases relied upon, reads:

"The rule is that where the legislature invests an administrative body or other agency of the government with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made. In such circumstances a finding is jurisdictional and action without the finding is void. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431, 55 Sup. Ct. 241, 79 L. ed. 446; *United States* v. *B. & O. Ry. Co.*, 293 U. S. 454, 462, 55 Sup. Ct. 268, 79 L. ed. 587; *Mahler* v. *Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549; *Wichita Railroad &*

Light Co. v. *Public Utilities Commission*, 260 U. S. 48, 43 Sup. Ct. 55, 67 L. ed. 124."

The interpretation of the above cited decisions of this Honorable Court by the Circuit Court of Appeals is, in our humble judgment, in conflict with the decisions actually rendered by this Honorable Court in these cases and constitutes the decision of a Federal question in a way probably in conflict with applicable decisions of this court. The decisions of this court above referred to, instead of holding that where the Legislature invests an administrative body or other agency of the Government, with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made, on the contrary hold that the power at all times exists in the administrative body or other agency of the Government, but that it is a condition to the exercise of this power that such finding or determination be made.

For instance, in *Mahler* v. *Eby, supra*, Mr. Justice TAFT in the court's opinion in that case said:

> "*It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise*, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

None of the above cases holds that power delegated by the Legislative Department, *to be exercised* on the finding of the existence of certain facts, is not at all times from and after the passage of the act vested in the Administrative body or other governmental agency, but they do hold that the power can only *be exercised* upon a proper finding of the

conditions under which the legislative branch of the Government has authorized the *power* to be exercised.

The fundamental fallacy of the decision of the Circuit Court of Appeals lies in the fact that the court confuses "power" with *the conditions under which that power may be exercised.* If the Fair Labor Standards Act of 1938 by the provisions of Section 13 (b)(1) had exempted employees as to whom the Interstate Commerce Commission *had prescribed* qualifications and maximum hours of service, then the decision of the Circuit Court of Appeals would be well founded, *but the act does not so define the exemption.*

The fact that by the terms of the Motor Carrier Act the Interstate Commerce Commission is not to *exercise its power* to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle, until need therefor is found, *does not mean that the Interstate Commerce Commission was not at all times vested with such power,* any more than it can be properly said that a court of general equity jurisdiction does not at all times have *power* to appoint receivers because of the fact that the power to make such appointments will be exercised only when the court determines the existence of conditions or circumstances under which a need therefor exists.

The proper interpretation of the clause "if need therefor is found" is well expressed by District Judge Boyd in his findings of fact and conclusions of law, filed in the case of *Clarence Gibson* v. *Wilson & Company,* decided by him as Judge of the District Court for the Western Division of the Western District of Tennessee on March 20, 1941, 4 Labor Cases (Commerce Clearing House) No. 60,466. Conclusion of Law No. VII reads:

> "The words 'if need therefor is found' in Section 204(a)(3) of the Motor Carrier Act, 1935, constitute a restriction and limitation *upon the exercise* by the Commission of the *power granted to it* to regulate maximum hours and qualifications of service of truck drivers of private carriers, *but do not restrict or limit the power granted* to the commission so to regulate the maximum hours and qualifications of service of such employees."

This court had occasion to consider the *power* of the Interstate Commerce Commission, under the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service of employees of motor carriers, in the case of *United States* v. *American Trucking Associations*, 310 U. S. 534-553, 60 S. Ct. 1059, 84 L. ed. 1345. In that case it was held that the employees with respect to whom the Interstate Commerce Commission had *power* to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 were those employees whose duties affect safety of operation. (Respondents are all truck drivers and they are concededly employees whose duties affect safety of operation.) It is true that the decision of this court in *United States* v. *American Trucking Associations*, *supra*, was concerned only with employees of common and contract carriers by motor vehicle, but it also seems evident, from the opinion in that case, that the court concluded that the *power* of the Commission extended equally to employees of common, contract and private carriers. It was the contention of appellees in the *American Trucking Associations* case that the difference in language between Sub-Sections (1) and (2) and Sub-Section (3) of Section 204 of the Motor Carrier Act was indicative of a Congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while

giving broader authority as to employees of common and contract carriers. This court rejected that contention and in the course of its opinion, delivered by Mr. Justice REED, among other things, said:

> "The Senate Committee's report explained the provisions of Sec. 204(a) (1), (2), 49 U. S. C. A., Sec. 304(a) (1), (2) as giving the Commission authority over common and contract carriers similar to that given over private carriers by Sec. 240(a) (3), 49 U. S. C. A., Sec. 304(a) (3)."

Again in the opinion in discussing an amendment to Section 203 of the Motor Carrier Act, providing an exemption of certain motor vehicles from the provisions of the Act, except the provisions of Section 204 thereof, this court said:

> "It is evident that the exempted vehicles and operators include common, contract *and private carriers.*"

We, therefore, believe the proper interpretation of this court's decision in *United States* v. *American Trucking Associations, supra,* leads to the conclusion that the *power* of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service of "employees" extends alike to employees of common, contract *and private* carriers and that the only limitation upon the *power* of the Commission is that delineated by this court in the above mentioned decision, to-wit, that the power of the Commission is limited to employees whose duties affect safety of operation. It is true that the conditions under which the Commission may exercise its power as to employees of private carriers are restricted further by the fact that the Commission must find a necessity for such regulation, but this is not a limitation upon the Commission's power but a condition upon which the power *may be exercised.*

We, therefore, conclude that the Circuit Court of Appeals for the Eighth Circuit, by its decision in this case, erroneously concluded that respondents were not exempt from the overtime provisions of the Fair Labor Standards Act and that such judgment and decision should be reversed.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
Attorney for Petitioner.